PP

v.

TAN HOCK BENG

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CRIMINAL TRIAL NO: 45-10-99]
2 JANUARY 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1) - Presumption of possession under s. 37(d) - Whether arose - Whether "motorcycle" fell within phrase "anything whatsoever containing" as defined in s. 37(d)*

EVIDENCE: *Adverse inference - Prosecution not calling some evidence - Failure of prosecution to call material witness - Whether court entitled to invoke s. 114(g) Evidence Act 1950 against prosecution for such failure - Ti Chuee Hiang v. PP*

EVIDENCE: *Exhibit - Break in chain of evidence - Prosecution unable to tender evidence as exhibit - Evidence auctioned off by police - Seriousness of such mishap*

EVIDENCE: *Best evidence - Non-production of - Whether photographs of evidence concerned sufficient - Whether best evidence rule should apply*

EVIDENCE: *Conflicting testimony - Duty of trial court to consider facts - Two versions as to whether there was pillion rider alongside accused during time of alleged offence - Duty of investigating officer to leave no gap in investigations*

EVIDENCE: *Exhibit - Break in chain of evidence - Absence of explanation as to what happened to exhibits between certain periods - Whether prosecution failed to establish prima facie case - Teoh Hoe Chye v. PP & Yeap Teong Tean v. PP*

CRIMINAL PROCEDURE: *Charge - Consideration of - Introduction of evidence not covered by charge and consent to prosecute - Whether fair to the accused*

EVIDENCE: *Expert evidence - Evidence of chemist - Trafficking in drugs - Failure of chemist to take minimum statutory requirement of 10% of drugs for analysing - Whether evidence of chemist sufficient to support charge - Section 37(j) Dangerous Drugs Act 1952*

The accused was charged with trafficking in heroin, an offence under s. 39B(1) of the Dangerous Drugs Act 1952 (the 'Act'). The offence was alleged to have been committed in front of a house whilst the offending drugs were discovered in a basket attached to the front of a motorcycle the accused was riding on at the time of the alleged incident.

Held:

[1] It appeared that the prosecution had relied on the presumption arising from s. 37(d) of the Act. Given that the accused did not have the offending drugs in person and since the evidence adduced was that the drugs were found in the said basket attached to the front of the motorcycle, the question that arose was whether a "motorcycle" fell within the phrase "anything whatsoever containing" as defined in s. 37(d) of the Act. (pp 180 h & 181 d)

[1a] By virtue of *PP v. Letchumanan*, a motorcycle did not come within the meaning of the words "anything whatsoever containing" as contained in s. 37(d) of the Act. Therefore the presumption under s. 37(d) did not arise. (p 181 e & f)

[2] The onus was on the prosecution to establish that no one else had excess to the said motorcycle. As such, this court must invoke s. 114(g) of the Evidence Act 1950 against the prosecution for failing to call as a witness, one Soon Ah See whose handphone was found in the basket attached to the motorcycle. (pp 181 g, i & 182 f)

[2a] As was said in *Ti Chuee Hiang v. PP*, the court has a duty to call all the necessary witnesses to establish proof against the accused beyond all reasonable doubt. If in the exercise of its discretion, the prosecution fails to fulfil this obligation, then it has failed to establish a *prima facie* case as required by the decision in *Tan Boon Kean v. PP*. (p 182 d)

[3] There was conflicting evidence as to the identification of the motorcycle in question. With such conflicting evidence, it was imperative that the said motorcycle should have been tendered as an exhibit. However, it was testified that the police auctioned off the motorcycle. This was a mishap which the court viewed as a serious setback. (p 183 b-c)

[3a] The photographs of the motorcycle concerned were not acceptable as sufficient evidence. The best evidence rule must apply and the motorcycle should have been produced. Photographs are no substitute for substantive evidence; at most they are corroborative evidence. (p 183 d-e)

[4] It was the duty of the investigating officer to leave no gap in the investigations. As it stood, there were two versions as to whether there was a pillion rider alongside the accused when he rode the motorcycle. The benefit of this doubt was consequently given to the accused, more so when the accused was facing the death penalty. (p 184 a)

[5] No evidence was led as to what happened to the exhibits, *ie*, the offending drugs between 28 August 1998 and 6 May 1999. On the authority of *Teoh Hoe Chye v. PP* and *Yeap Teong Tean v. PP*, this was yet another instance where the prosecution had failed to establish a *prima facie* case. (p 184 d & e)

[6] Furthermore, there was introduction of some evidence not covered by the charge and by the consent to prosecute. This had vitiated any fair chance that the accused might have had of being acquitted of the main charge. (p 184 g)

[7] The evidence of the chemist was sorely lacking in order to support the charge. This was because the chemist only took less than 1% of the drugs for analysing when he ought to have taken the minimum statutory requirement of 10% as stipulated in s. 37(j) of the Act. The accused was thus deprived of the best advantage which he was entitled to. (p 184 h)

[Accused called to enter defence on amended charge; having pleaded guilty, accused was subsequently found guilty and convicted on the amended charge.]

Case(s) referred to:
Abdullah Zawawi v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 ***(refd)***
PP v. Letchumanan [2000] 4 CLJ 685 ***(foll)***
PP v. Lin Lian Chen [1992] 1 CLJ 2086; [1992] 1 CLJ (Rep) 285 ***(foll)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 ***(foll)***
Teoh Hoe Chye v. PP & Yeap Teong Tean v. PP [1987] 1 CLJ 471; [1987] CLJ (Rep) 386 ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 180
Dangerous Drugs Act 1952, ss. 37(d), (h), (j), 39B(1), (2)
Evidence Act 1950, s. 114(g)

For the appellant - Adnan Aziz DPP
For the respondent - Ranjit Singh; M/s R Rajasingam & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

RK Nathan J:

Facts

The accused was charged with an offence under s. 39B(1) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the said Act in that he was said to have been trafficking in heroin weighing 22.53 grams and the said offence was alleged to have been committed on 5 August 1998 at about 2.30pm in front of house No. 1040E Jalan Rambai, Paya Terubung, Penang. On receipt of information relating to this case, a raiding party went to the said house in two cars. One car with some police in it was parked in front of the said house and the other car was parked along a lane adjoining to the said house. All the police witnesses testified seeing the accused ride motorcycle PDP 443 to the house. He then stopped the motorcycle in front of the gate and was about to alight from the said motorcycle to open the gate. SP4 the raiding officer then identified himself, switched off the engine and seized the key to the motorcycle. He then discovered from inside a basket attached to the front of the motorcycle a packet wrapped in newspapers. On opening the wrapper he found a plastic packet containing what he suspected to be heroin. On seeing this, the accused pleaded for help and asked not to be arrested.

Findings Of The Court

Burden Of Proof

On the issue of the burden of proof in criminal cases with regard to the prosecution having to establish a *prima facie* case, the Federal Court in *Tan Boon Kean v. Public Prosecutor* [1995] 4 CLJ 456 held that the prosecution evidence must be capable of belief and that only beyond reasonable doubt evidence could constitute such credible evidence. It went on to hold that under s. 180 of the Criminal Procedure Code a *prima facie* case is one where every essential ingredient of the charge is established by sufficient, beyond reasonable doubt evidence and that such evidence can be overthrown by rebutting evidence of the defence sufficient to cause a reasonable doubt on the prosecution's case as to the guilt of the accused. With the duty of the prosecution to establish a *prima facie* case now firmly set, at the close of the prosecution's case I evaluated the evidence adduced.

Possession

In this case the prosecution relied on the presumption arising from s. 37(d) of the Act which reads as follows:

37. In all proceedings under this Act or any regulation made thereunder:

(a) xxx

(b) xxx

(c) xxx

(d) any person who is found to have in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

Since the accused did not have it in his person and since the evidence adduced was that the offending drugs were in fact found in a basket attached to the front of the motorcycle, the question is, does a motorcycle fall within the phrase "anything whatsoever containing" as defined in s. 37(d) of the Act. In *Public Prosecutor v. Lin Lian Chen* [1992] 1 CLJ 2086; [1992] 1 CLJ (Rep) 285 the Federal Court held that a vehicle, and in that case it was a motorcar, in which a drug is carried does not *ipso facto* fall within the words "anything whatsoever containing any dangerous drugs" and that therefore in such a case, the presumption contained in s. 37(d) of the Act did not arise. As to whether 'vehicle' includes a motorcycle, this issue has also been put to rest by Augustine Paul J in *Public Prosecutor v. Letchumanan* [2000] 4 CLJ 685 where he held that a motorcycle did not "come within the meaning of the words 'anything whatsoever containing' in s. 37(d) of the Act." I agree with this proposition of the law and therefore held that the presumption under s. 37(d) did not arise. I also held that the presumption under s. 37(h) of the Act did not arise as the offending drugs were not concealed in any specially constructed compartment of the motorcycle.

As to whether anyone else could have had access to the motorcycle, there is clear evidence that a handphone belonging to one Soon Ah See was found in the basket attached to the motorcycle. Soon Ah See was a tenant of the house which the accused was about to enter. Soon Ah See was never called as a witness although PW9 Inspector Rajaram, the investigating officer of this case, admitted that a statement under s. 112 of the Criminal Procedure Code was recorded from her. PW9 also admitted under cross-examination that he was unsure whether any of the four occupants of the house whom he named were in possession of the said motorcycle prior to the arrest of the accused. There is no evidence as to how long prior to the arrest the accused had possession of the said motorcycle and where he came from. Clearly as submitted by the defence, this court must invoke s. 114(g) of the Evidence Act 1950 against the prosecution for failing to call at least Soon Ah See as a witness. It is

appropriate to cite a passage from the judgment of Salleh Abas LP (as he then was) in *Abdullah Zawawi v. Public Prosecutor* [1985] 2 CLJ 2; ([1985] CLJ (Rep) 19) in respect of the failure of the prosecution to call a relevant witness. This is what His Lordship said at p. 7 (at p. 23):

> The practice of making available a witness or witnesses from whom statements have been taken is to prevent the defence from commenting upon the honesty of the prosecution and thus invoking the often quoted presumption of adverse inference under section 114(g) of the Evidence Act. But where the prosecution evidence falls short of proving a *prima facie* case at the end of its case, the right not to call such witness/witnesses and to make him/them available to the defence will be of no avail. If the doubt consists of the gap arising out of the matters adumbrated earlier, the prosecution must close this gap. It is not for the defence to call the offered witness/witnesses to supplement the prosecution case.

As said by the Federal Court in *Ti Chuee Hiang v. Public Prosecutor* [1995] 3 CLJ 1 whilst the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it also has a duty to call all the necessary witnesses to establish proof against the accused beyond all reasonable doubt. It is my judgment that if in the exercise of its discretion, the prosecution fails to fulfil this obligation, then it has failed to establish a *prima facie* case in respect of the charge.

It is also my judgment that the onus is on the prosecution to establish that no one else had access to the said motorcycle. It is not the duty of the defence to show that others had access to the same motorcycle. I say this because PW4, the raiding officer, agreed under cross-examination that the arrest was based on information received. He also admitted that the informer could have been a paid informer and could have been involved in trafficking himself. In *Abdullah Zawawi (supra)* in respect of a similar situation relating to an informer, Edgar Joseph Jr. SCJ said at p. 7 (at p. 23) as follows:

> The judge was of the view that though the house was still under construction there was no evidence to show that there had been access to the house through the uncompleted part. With respect, given the fact that this was a case where the police were acting on a tip-off, undoubtedly by an informer, who might have been a paid informer, and the further fact that the house was still under construction, the onus was not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility. Of course, the defence could besides taking advantage of infirmities in the prosecution case in this regard, have gone further, and shown the possibility of access by others, but this they were not, in law, obliged to do.

Non-production Of Motorcycle In Question

Photographs taken of motorcycle PDP443 marked P3, w, x, y were produced. However, PW3 the officer from the registrar and inspector of motor vehicles (JPJ) testified that the said motorcycle was a Honda C 100, a Honda Cub. However PW4 the raiding officer testified that the said motorcycle PDP 443 was a model EX 5. With such conflicting evidence, it was imperative that the said motorcycle PDP 443 ought to have been tendered as an exhibit. However the investigating officer testified that he was unable to produce the said motorcycle as it had been auctioned off by the police. This is clearly a sorry state of affairs. How could an exhibit be auctioned off? Surely there must be some check and balance to ensure that exhibits in respect of pending cases are kept safely. No one came forward to explain. This court is concerned and views such mishap as a serious setback. There ought to be proper investigations into such serious aberration of duty. Surely, someone must be held responsible and I trust that proper investigations would be conducted into the auctioning of this motorcycle.

In so far as the photographs are concerned, I am not prepared to accept them as sufficient evidence. To my mind the best evidence rule must apply and the motorcycle ought to have been produced more so when the accused is facing a charge that brings about nothing more and nothing less than the death penalty. Photographs are no substitute for substantive evidence; at most, they are corroborative evidence.

Finally, the accused is charged with having in possession the offending drugs, in the basket of the motorcycle in question. When the motorcycle itelf is not produced, where is the evidence to suggest that it was actually found in the basket attached to the motorcycle, notwithstanding the evidence of the registrar and inspector of motor vehicles that at the relevant time the said motorcycle was registered in the name of the accused.

Was There A Pillion?

It had been the case of the accused as put during the cross-examinatiion of the prosecution witnesses that when he rode motorcycle No. PDP 443 he had a pillion named Ong Lay Hoon, a student aged 14 years old, and who was also a tenant of the said house and whose mother was the elusive Soon Ah Lee. The accused had through the cross-examination of the prosecution witness, denied he was alone when arrested. PW9 Insp. Rajaram, the investigating officer, admitted in evidence that the accused told him that when arrested he had the said Ong Lay Hoon as pillion. When this version was put to the raiding officer (PW4) he denied there was a pillion. When PW9 was asked whether he carried out any investigations into this discrepancy, he said he did not. Surely, it was the duty of PW9 as the investigating officer to leave no

gap in the investigations. He ought to have conducted some form of investigation as to the truth or otherwise of the accused's story. As it stands, there are two versions. The law therefore requires that I give the benefit of this doubt to the accused, more so when he is facing the death penalty.

The Exhibits

Evidence was led that the offending exhibits were handed to PW9 the investigating officer by PW4 the raiding officer on 5 August 1998 at 5.35pm. PW9 testified that after weighing the exhibits he kept them. PW9 further testified that he visited the scene of the crime on 6 August 1998 and following that he took photographs of the offending exhibits and that he then sealed the said exhibits. He said that the exhibits were sent to the chemist on 10 August 1998 at 2.18pm and that he received them back from the chemist on 28 August 1998. He then sent the exhibits to D.S.P. Ramli (PW6) the officer-in-charge of exhibits on 6 May 1999. What is most baffling is, no evidence was led as to what happened to the exhibits between 28 August 1998 and 6 May 1999. No evidence was led as to where the said exhibits were kept and whether they were under lock and key. In this respect it is appropriate to refer to *Teoh Hoe Chye v. Public Prosecutor* and *Yeap Teong Tean v. Public Prosecutor* [1987] 1 CLJ 471; [1987] CLJ (Rep) 386 where the then Supreme Court also made a similar critical comment as to the absence of explanation as to what happened to the exhibits between the time they were handed to the investigating officer and to the time they were examined by the chemist. This is yet anotner instance where the prosecution had failed to establish a *prima facie* case as required by the decision in *Tan Boon Kean (supra).*

Consent (P1)

The consent to prosecute and the charge sheet show that the amount of drugs the accused was charged with trafficking was 22.53 grams of heroin and that the place of arrest was in front of house No. 1040E. However, evidence was led of two other packets one weighing 2.63 grams and the other 0.49 grams which were found in the premises of the said house No. 1040E. To my mind this is totally unfair to the accused in that it had seriously prejudiced him. The introduction of the evidence not covered by the charge and by the consent has vitiated any fair chance that the accused might have had of being acquitted of the main charge.

Analysis Of The Drugs By The Chemist

The section regulating the amount of drugs to be taken for analysis by the chemist is s. 37(j) of the Act. The said section reads as follows:

(j) when any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, that the contents of all the receptacles consist of or contain the same proportion of such drug.

From the total initial weight of 223.6 grams of heroin PW2 the Chemist testified that he took 0.3863 grams for analysis whereas 10% of the total weight would have been 22.36 grams. In fact the chemist did not even take 1% which in itself would have been 2.236 grams. The accused is entitled to the best advantage which he had been sorely deprived of. When the minimum requirement was 10% the chemist took a sample of even less than 1% for analysing. Besides the chemist gave no reasons for failing to comply with the statutory requirement.

There is another major defect in the prosecution's case in that there was no evidence as to when the instruments used for weighing the drugs were last calibrated although specifically challenged by the defence. In the circumstances the evidence of the chemist was sorely lacking in order to support the charge.

Plea Against Arrest

Evidence was led by the arresting officer that when the accused was arrested outside the house he made a plea for help "minta tolong" and asked that he be not arrested after PW4 had opened the packet wrapped in paper. The learned deputy public prosecutor contended that this reflected a guilty mind. I do not think so. When confronted by a party of raiding officers who had just then discovered what is said to be heroin wrapped in paper and placed in a basket attached to the motorcycle which the accused was riding, surely a plea to help not to be arrested is a reflexive action based on panic. To my mind, such a conduct is more attributable to innocence than to guilt because if the accused was indeed guilty he would rather keep quiet than plead not to be arrested, as he ought to know that on no account could the party of police officers not arrest him, if he knew he was guilty. Therefore I do not think much can be made out of this. If at all this argument favours the accused.

Having considered the submissions of both parties I called upon the accused to enter his defence on an amended charge which read as follows:

Bahawa kamu pada 5 Ogos 1998, jam lebih kurang 2.30 petang, di hadapan rumah No. 1040E, Jalan Rambai, Paya Terubung, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang ada dalam milik kamu dadah berbahaya, iaitu heroin seberat 0.3863 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 (Semakan 1980), dan boleh dihukum di bawah seksyen 12(3) Akta yang sama.

The said charge was read to the accused. After requesting for a short adjournment and after the charge was read again and explained to the accused, the accused pleaded guilty to the said amended charge and indicated that he understood the nature and consequences of his plea of guilt. I then found the accused guilty and convicted him on the amended charge.

In mitigation Mr. Ranjit Singh informed the court that the accused was 41 years old, a bachelor and a first offender. He urged the court to consider the plea of guilt and prayed for any sentence to take effect from the date of arrest. The learned deputy urged the court to consider the fact that each year dadah related offences were increasing in number and prayed for a maximum sentence.

Having considered all facts and the plea of mitigation and the view of the learned deputy with regard to sentence, I sentenced the accused to the maximum five years' imprisonment to commence from the date of arrest. I also imposed a fine of RM100,000, in default 15 months' imprisonment and ordered the exhibits to be returned to the police for disposal after the appeal period.